

EXHIBIT D

Part 10 of 14

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Table 1. Average Monthly Counts							
	Institution Operated By: Wackenhut Corrections Corporation (WCC), Corrections Corporation of America (CCA), State of Louisiana (Public)						
	WCC	Public	CCA	Public	Public	Public	Public
Institution	Allen	Avoyelles	Winn	Hunt	Dixon	Angola	Wade
Mean Inmate Population	1206.9	1227.2	1214.9	1775.5	1367.4	4741.8	1021.9
Performance Measure							
escapes	3	0	5	5	4	6	1
assaults on staff with injury	1.78	1.06	2.26	1.64	1.31	24.11	1.33
assaults on staff/serious injury	0.0455	0.1389	0	0	0.139	0.278	0.556
assaults on staff/non-serious injury	1.73	0.917	2.261	1.639	1.167	24.08	1.278
Cat. I,II,III incidents	28	38.5	30	55.8	26.4	154.1	22.3
aggravated sex offenses	11.1	4.3	8.5	6.1	2	27.9	3.9
aggravated cat I sex offenses	2.023	2.028	1.217	2.861	1.056	7.222	1.611
aggravated class II sex offenses	9.114	2.222	7.283	3.251	0.9444	20.667	2.778
institutional disturbances	0.9555	4.5	4.457	17.556	1.444	26.694	1.694
major inst. disturbances	0.114	0.194	0.0455	0.0278	0	1.0556	0.0833
minor inst disturbances	0.841	4.306	4.413	17.556	1.444	24.694	1.694
assaults/inmate on inmate	13.455	26.278	17.421	28.083	18.417	67.778	14.083
assaults/serious injuries	0.136	1.056	0.304	0.1389	0.3043	0.5556	0.111
assaults/non-serious injuries	13.318	25.222	13.978	27.944	18.028	67.222	13.318
assaults/weapon	2.523	3.861	2.652	0.0833	0.1111	0.0556	0.0556
assaults/no weapon	10.932	22.417	11.63	19.778	16.417	38.639	11.778
assaults/weapon and serious injury	0.068	0.528	0.261				
assaults/weapon and no serious injury	2.455	3.333	2.391				
assaults/no weapon/serious injury	0.068	0.528	0.043				
assaults/no weapon/no serious injury	10.864	21.889	11.587				
total disciplinary actions	374.1	859.8	459.6	567.1	687.2	1009	1779
schedule A disciplinary actions	42.3	282.3	153.9	103.4	102.2	258.9	396.7
schedule B disciplinary actions	325.9	515.4	291.7	399.1	558.9	697.8	1274.1
monthly gunshots	0.25	2.25	0.152	0.9722	2.5833	7.222	1

Table 2. Average Monthly Rates / 1,000							
	Institution Operated By: Wackenhut Corrections Corporation (WCC), Corrections Corporation of America (CCA), State of Louisiana (Public)						
	WCC	Public	CCA	Public	Public	Public	Public

Institution	Allen	Avoyelles	Winn	Hunt	Dixon	Angola	Wade
Mean Inmate Population	1206.9	1227.2	1214.9	1775.5	1367.4	4741.8	1021.9
Performance Measure							
escapes	2.4857	0	4.1156	2.8161	2.9253	1.2653	0.9786
assaults on staff with injury	1.4749	0.8638	1.8602	0.9237	0.958	5.0846	1.3015
assaults on staff/serious injury	0.0377	0.1132	0	0	0.1017	0.0586	0.5441
assaults on staff/non-serious injury	1.4334	0.7472	1.8611	0.9231	0.8534	5.0782	1.2506
Cat. I,II,III incidents	23.2	31.372	24.693	31.428	19.307	32.498	21.822
aggravated sex offenses	9.1971	3.5039	6.9965	3.4357	1.4626	5.8838	3.8164
aggravated cat I sex offenses	1.6762	1.6525	1.0017	1.6114	0.7723	1.5231	1.5765
aggravated class II sex offenses	7.5516	1.8106	5.9947	1.831	0.6907	4.3585	2.7185
institutional disturbances	0.7917	3.6669	3.6686	9.8879	1.056	5.6295	1.6577
major inst. disturbances	0.0945	0.1581	0.0375	0.0157	0	0.2226	0.0815
minor inst disturbances	0.6968	3.5088	3.6324	9.8879	1.056	5.2077	1.6577
assaults/inmate on inmate	11.148	21.413	14.339	15.817	13.469	14.294	13.781
assaults/serious injuries	0.1127	0.8605	0.2502	0.0782	0.2225	0.1172	0.1086
assaults/non-serious injuries	11.035	20.552	11.505	15.739	13.184	14.176	13.033
assaults/weapon	2.0905	3.1462	2.1829	0.0469	0.0812	0.0117	0.0544
assaults/no weapon	9.0579	18.267	9.5728	11.139	12.006	8.1486	11.526
assaults/weapon and serious injury	0.0563	0.4302	0.2148	0	0	0	0
assaults/weapon and no serious injury	2.0341	2.7159	1.9681	0	0	0	0
assaults/no weapon/serious injury	0.0563	0.4302	0.0354	0	0	0	0
assaults/no weapon/no serious injury	9.0016	17.837	9.5374	0	0	0	0
total disciplinary actions	309.97	700.62	378.3	319.4	502.56	212.79	1740.9
schedule A disciplinary actions	35.048	230.04	126.68	58.237	74.74	54.6	388.2
schedule B disciplinary actions	270.03	419.98	240.1	224.78	408.73	147.16	1246.8
monthly gunshots	0.2071	1.8334	0.1251	0.5476	1.8892	1.5231	0.9786

Appendix 3

Legal Issues Relevant to Private Prisons

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TABLE OF CONTENTS

Appendix 3

Legal Issues Relevant to Private Prisons

1.	Introduction	1
2.	The Legality of Delegating Correctional Services to Private Contractors Generally	3
	A. The Current Limits of Federal and State Delegation Principles	4
	B. Addressing Possible Due Process Concerns in Correctional Privatization	7
	1. Basic Due Process Principles Governing Delegation Scenarios	7
	2. Specific Ways of Addressing Due Process Concerns in Correctional Privatization	9
3.	Liability for Private Prison Conditions	B
	A. The Impact of Privatization on Liability Exposure	B
	1. Inmates' Overwhelming Reliance on Section 1983 Cases to Redress Grievances	14
	2. Are Private Prison Contractors Amenable to Suit under Section 1983?	15
	3. Do Private Prison Officials Have a 'Qualified Immunity' Under Section 1983?	17
	4. Private Contractor and Governmental Liability Exposure in Section 1983 Litigation	19
	B. The Role of Indemnification, Insurance and Monitoring in Reducing Liability and Litigation Costs	21
	1. Indemnification and Insurance	21
	2. Monitoring to Safeguard Against Liability Resulting from Government Duties	24
4.	Employment and Labor Relations Issues	27
	A. Potential Civil Service Impediments	27
	B. The Significance of Private Correctional Firms' Independent Contractor Status	28
	C. Effects of Privatizing an Existing Unionized Facility	30
	D. The Right to Strike	31
	1. No-Strike Clauses	32
	2. Strike Notification/Mandatory Delays	32
5.	Inmate Labor Questions	34
	A. Constitutional Dimensions	34
	B. Federal prisons and inmate labor	35
	C. State Prisons and Inmate Labor	35

6.	Other Important Legal Issues	37
A.	Access to Private Prison Records	37
B.	Private Contractor Access to Criminal History Records	39
C.	Bankruptcy	40
D.	Use of Force	43
E.	Environmental Law Concerns	45
7.	Regulating Interjurisdictional Private Prison Contracting	47
A.	Interjurisdictional Contracting Out and Legal Problems	48
B.	Some Regulatory Solutions	52
8.	Legal Dimensions of Contracting	56
A.	Regulatory Purposes and Contract Specificity	56
B.	The Importance of Objective Standards	58
1.	Special Attention to Staffing and Training	59
C.	Effective Contract Performance and Enforcement	60
1.	Contract Term and Renewal	60
2.	Bolstering Good Performance	61
3.	Contract Enforcement through Termination	61
4.	Contract Enforcement Through Fines and Penalties	62
5.	Dispute Resolution	66

1. Introduction

The legal issues affecting private prisons have attracted nearly as much attention as the moral, cost, and performance-related issues surrounding the correctional privatization movement. From questions about the constitutionality of delegating the incarceration function in the first place, to the legality of private prison guards going on strike, the legal dimensions of correctional privatization have often elicited great concern from public correctional officials and the general public. Specific concerns have, however, changed over time, as practical experience and legal precedent have provided answers to many previously unresolved questions. For example, a fundamental issue that arose in the mid-1980s along with the birth of the private prison industry was whether private prisons would be considered “state actors” amenable to inmate civil rights suits and subject to all of the constitutional standards applicable to public prisons. Over the past several years, courts have affirmatively answered that question. Likewise, the Supreme Court last year ruled on another significant matter, deciding that private prison guards may not share public correctional officers’ qualified immunity from suit in federal civil rights actions.¹

While a host of subsidiary legal and contractual matters continue to receive attention and provoke discussion, governments are becoming more active in passing legislation, issuing regulations, and insisting on contractual provisions that limit contractor discretion in important areas of public policy. Public correctional authorities and their lawyers are becoming more sophisticated about the pitfalls of private prison contracting and how governments can protect themselves from both a cost and performance standpoint. One highly-publicized example of this phenomenon involves states passing legislation to address the growing number of private prisons that accept prisoners from outside the state.

Few attempts have been made to address the entire breadth of legal issues surrounding private prisons in a relatively succinct form.² This appendix makes such an attempt, employing a straightforward presentation that should be useful to correctional specialists and laypersons alike. It relies on a variety of sources for its information, including private prison contracts and requests for proposals (RFPs), law review and other journal articles, federal and state statutory and case law, survey information gleaned from federal and state officials summarized in other parts of this report, and interviews with public and private correctional authorities and specialists.

This appendix traces the legal system’s accommodation of prison privatization as the latter has evolved over the past 15 years. The report begins with the broadest constitutional questions, raised at the outset of the privatization debate, and concludes with a discussion of the latest efforts of state legislatures to gain greater control over the incarceration of out-of-state inmates in private prisons within their borders. Only legal issues that significantly turn on private entities as prison operators are examined.

1 *Richardson v. McKnight*, 117 S. Ct. 2100 (1997).

2 One such early effort, which was quite detailed, nevertheless failed to treat some issues in depth, e.g. public access to private prison records. Moreover, this study is now a decade old and has been superseded in many subjects by recent legal developments. See I. Robbins, *The Legal Dimensions of Private Incarceration* 396-413 (1988).

The focus of the report is on practical issues of a kind most likely to confront public and private corrections officials. It also focuses on contracts for the management of private prisons, rather than on contracts for the design and construction and management of future correctional facilities: except for detailed public finance issues that vary from jurisdiction to jurisdiction, there are few issues of any significance peculiar to private prison design construction. Finally, the report addresses both publicly- and privately-owned facilities managed by private contractors, although there is a slightly greater emphasis on publicly-owned prisons. Where relevant, legal distinctions that turn on ownership are noted (e.g., in the case of potential contractor bankruptcies).

This report does not make any recommendations *per se*, but occasionally notes where certain statutory or contractual mechanisms have yielded positive and negative results. The major issues are arranged by section.

2. The Legality of Delegating Correctional Services to Private Contractors Generally

When the whole enterprise of correctional privatization has been challenged, the legal basis for such an action has often been couched in terms of constitutional ‘delegation’ issues. At the heart of these constitutional considerations is the worry that political accountability and disinterested decision making may be lost when administration and operation of places of incarceration are turned over to the private sector -- something that, prior to the mid-1980's, had not been encountered. Critics have also raised particular concerns about private correctional contractors’ financial interests leading them to minimize releases and maximize sentences to keep their facilities filled. These core concerns have seemed to reinforce doubts about the overall propriety of delegating the state’s power to incarcerate to private, for-profit corporations.

Despite these worries, no serious delegation challenge has been mounted against a statute or contract allowing the private sector to incarcerate inmates. Although delegation concerns were prominently raised in the 1980s as a potential roadblock to correctional privatization,³ few observers today believe that, with certain safeguards in place, a government may not legally contract out its power to incarcerate.⁴ There now appears to be broad agreement that delegation concerns, if any, do not hinge on the overall policy choice of entrusting the day-to-day management of prisons to private parties, but rather on the details of how such transfers of responsibility are structured (including the rules by which such prisons are intended to operate), and who has ultimate authority for a number of decisions affecting inmate rights and welfare.

As discussed below, the often diffuse “delegation” concerns expressed about prison privatization tend to subsume or confuse several discrete legal issues, including the federal constitutional “delegation doctrine,” state constitutional delegation standards, the due process requirements of the U.S. Constitution (made applicable to states and local governments through the Fourteenth Amendment), and specific questions about statutory enabling authorization that may vary from jurisdiction to jurisdiction. It is apparent, however, that while modern challenges to correctional privatization may be couched in terms of “delegation,” the analytical basis for these challenges will usually turn on due process concerns. A due process analysis is particularly sensitive to the need to have state correctional officials retain responsibility for promulgating many kinds of prison rules and making final decisions on release-related matters such as sentencing, parole, discipline, ‘good time’ awards, work assignments, and possibly classification. A second type of delegation challenge is often based on inadequate privatization enabling legislation.

3 See, e.g., Field, Note, *Making Prisons Private: An Improper Delegation of a Government Power*, 15 Hofstra L. Rev. 649 (1987); Robbins, *The Legal Dimensions of Private Incarceration*, *supra* note 2 at 396-413.

4 Perhaps acknowledging the contemporary importance of privatization generally, as well as the history of private prisons in this country, no one appears to have convincingly argued that the running of prisons, as opposed to the decisional control over the incarceration of inmates in the first place (a police power), is so much a ‘core’ governmental function that it may *never*, even with proper safeguards, be delegated to private parties as a *legal* (as opposed to moral or ethical) matter. While at least one article has made that argument, it tends to ignore the details of delegation jurisprudence and the degree to which government oversight and accountability can be built into a prison privatization arrangement. See *Making Prisons Private: An Improper Delegation of a Government Power*, *supra* note 3.

A. The Current Limits of Federal and State Delegation Principles

Delegation principles at the federal and state level safeguard against the transfer of government powers to public and private bodies without proper constraints. However, reflecting political reality as much as legal doctrine, courts today are unlikely to invalidate an entire prison privatization arrangement on delegation grounds.⁵ The reason is twofold. First, in the modern era, courts have given political leaders wide discretion in determining how to implement policy decisions, including reliance on the private sector.⁶ The tendency is to view most of the functions transferred to private agencies (as well as subordinate public agencies) as largely or purely *administrative* in nature. Only delegated rule making and adjudication functions -- which directly purport to exercise a government power -- are usually deemed to require special judicial scrutiny.⁷

Second, the delegation doctrine at the federal level has effectively become moribund over the last half-century,⁸ a telling reflection of the rise of the administrative state. Delegations to administrative agencies have been so liberally construed that private delegations have tended to be viewed in the same light despite their significantly different factual and ethical attributes. Reflecting this trend, the Supreme Court has sometimes enunciated the principle of nondelegation, but has almost without exception sustained the constitutionality of challenged delegations. As discussed below, rather than invalidating private delegations outright, the Court has used the due process provisions of the Fifth and Fourteenth Amendments of the Constitution to protect the fundamental interests of those affected by a delegation. At the state level, courts have breathed more life into state constitutions concerning delegation questions, but their analysis has generally tended to recapitulate the due process concerns identified by federal courts.

The weakness of the federal delegation doctrine is starkly indicated by the fact that in the area of *private delegations*, as opposed to delegations of power to executive branch agencies, the Supreme Court has not invalidated a delegation since the New Deal-era case of *Carter v. Carter Coal Co.*⁹ Since that time, the Court has only haphazardly addressed the delegation doctrine, and even then, only in public delegation contexts where property, rather than liberty, interests were at stake.¹⁰ Insofar as these cases collectively have any indirect application to the privatization context, they simply stand for the proposition that delegations of legislative and policy-making power must be narrowly

5 Possible exceptions may include privatization arrangements where due process is violated or where little or no statutory authority for the delegation exists. See pp. 5-6 *infra*.

6 See e.g., *Berman v. Parker*, 348 U.S. 26, 33-34 (1954) (upholding reliance on private companies to implement federal urban redevelopment policy).

7 See generally Lawrence, *Private Exercise of Governmental Power*, 61 Ind. L.J. 647, 650-653.

8 See generally, e.g., K. Davis, *Administrative Law Treatise* § 3. See also Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 U.C.L.A. L. Rev 911, 917-920, 926 (1988).

9 298 U.S. 238 (1936). The Court struck down a federal statute allowing a majority of miners and producers to agree on wages and hours that would be binding on minority members of the industry.

10 See, e.g., *Industrial Union Dep't v. American Petroleum Institute (the Benzene Case)*, 448 U.S. 607 (1980); *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). The Court did once, in 1958, allude to the fact that it would apply a stricter standard for cases involving liberty interests, see *Kent v. Dulles*, 357 U.S. 116, but this principle, has never received further elaboration.

construed and have a clear, unambiguous statutory basis.¹¹ In particular, these cases favor standards ensuring that elected officials make important policy choices, private officials have a sufficiently clear “intelligible principle” to channel their delegated discretion, and “ascertainable standards” exist by which reviewing courts can evaluate such discretion.¹²

Under a *post-Carter* delegation analysis, a legitimate delegation challenge might be sustained if a new prison privatization arrangement were undertaken with no statutory authorization, or pursuant to a statutory or contractual scheme that left broad areas of sensitive decision-making implicating due process requirements -- for example, disciplinary proceedings or the formulation of release-related rules -- to private correctional officials’ discretion. This is generally how various states have applied their own delegation doctrines: courts have struck down statutes granting rulemaking and adjudication authority to private parties where the state did not retain ultimate authority to accept, reject, or modify administrative rules and review adjudicative determinations.¹³

As a matter of practical and political reality, courts may be wary of invalidating on delegation grounds fully operational privatization contracts, even if they lack what would otherwise be viewed as proper statutory authorization.¹⁴ Moreover, contract provisions agreed to by governments and private contractors may obviate otherwise defective statutes, depriving potential litigants of an actual harm or controversy. Still, in the case of new or planned operations, delegation-type challenges based on deficient legislation might emerge that require statutory remediation.¹⁵

Both for reasons of litigation prevention and sound public policy, few would argue against the long-term wisdom of adopting some kind of meaningful and comprehensive statutory authorization. Adopting some minimal statutory scheme strengthens the public legitimacy of privatization and can ensure that there is some set of minimal standards below which contractual arrangements may not fall.

11 The underlying purpose of delegation principles derives from the separation of powers notions, which protects the polity from uncontrolled discretionary power. The weakness of the delegation principles’ relevance to private delegations is underscored by the fact that insofar as the purpose of the separation-of-powers requirement underlying the delegation doctrine is to protect individual liberty by dispersing power, then private delegations “actually promote that very goal, because power is spread still further [beyond state bodies]. One need not carry the argument that far, however, to see that the separation-of-powers principle is a weak foundation for limiting private delegations.” Lawrence, *Private Exercise of Governmental Power*, *supra* note 7 at 665-66 (1986).

12 See, e.g., *Industrial Union Dep’t*, *supra* note 10 at 686. The meaning of “intelligible principle” has varied somewhat from case to case but generally implies a well articulated rationale as to why a delegation is warranted in the first place. See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

13 See Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, *supra* note 8 at 930-950, for a comprehensive discussion of state law approaches to the delegation doctrine. For example, in one leading case, a court invalidated the Oregon Public Service Commission’s attempt to adopt, without discussion, safety code revisions (including future revisions) proposed by private committees of interested parties. *Hillman v. Northern Wasco County Peoples’ Utility District*, 213 Ore. 264, 323 P.2d 664 (1958), *overruled on other grounds*, *Maulding v. Clackamas County*, 278 Ore. 359, 563 P.2d 731 (1977).

14 This would be especially true in the case of a newly-constructed private facility where millions of dollars of public funds had already been invested in the project.

15 Although even in that case, the speculative or premature nature of some legal challenges may result in dismissal. See, e.g., *Ohio Patrolmen’s Benevolent Ass’n v. Repke*, 1995 Ohio App.; LEXIS 5876 (1995) (nondelegation issue deemed premature, not ripe for review).

To date, however, some 20 states have not expressly authorized private prisons,¹⁶ and of those, five have gone ahead with some form of private contracting for imprisonment.¹⁷ The federal government, though possibly without a broad authorization to privatize,¹⁸ has nevertheless secured congressional authorization to pursue two privatization arrangements.¹⁹ The tendency among many jurisdictions moving ahead with correctional privatization has been to rely on contractual safeguards to address the due process problems potentially raised by an inadequate statutory framework.

In sum, while sound, detailed enabling legislation may help to create a firmer basis for private correctional accountability, only in certain situations is a statutory deficiency likely to give rise to a delegation challenge that jeopardizes an entire privatization enterprise.²⁰ Challenges to

16 The 20 states are Alabama, California, Delaware, Hawaii, Indiana, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Dakota, Rhode Island, South Dakota, South Carolina, Vermont, Washington, and Wisconsin. The state of Illinois actually expressly *prohibits* private prisons.

17 Kansas, Hawaii, Idaho, Minnesota, and Missouri. Kansas has required its inmates to be placed in private in-state facilities, while the other states have sent some of their prisoners to out-of-state private prisons.

18 The general legislative basis for the Federal Bureau of Prisons entering into contracts for the incarceration of prisoners in the private sector has not been entirely clear. The BOP has, since 1983, maintained that it has the authority to make contracts for the secure confinement of adult prisoners in the private sector. At least one scholarly commentator, as well as the General Accounting Office, have argued that BOP lacks such authority. See Robbins, *The Legal Dimensions of Private Incarceration*, *supra* note 2 at 396-413; U.S. General Accounting Office, *Private Prisons: Cost Savings and BOP's Statutory Authority Need to be Resolved*, GAO Report No. GAO/GGD-91-21 (Feb. 1991) at 45-50. After several years of intensive debate, the momentum to create a more explicit basis for overall federal prison privatization has appeared to die down, and BOP has pushed ahead with new privatization plans specific statutory authority being employed. See fn. 19, *infra*.

BOP maintains that 18 U.S.C. § 3621(b) provides the Bureau with independent authority to contract with the private sector for secure adult prison facilities. The section states:

(b) PLACE OF IMPRISONMENT.-- The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise. . . .

(emphasis supplied). Because several other provisions in Title 18 specify the kinds of arrangements that BOP may make to obtain prison facilities, and allow the use of only one category of nonfederal facilities -- those operated by state and local governments and furnished to the federal government by way of contract -- some observers charge that the general language in § 3621(b) cannot extend to *private* facilities. The clear inference, they maintain, is that Congress failed to provide for any arrangements such as private incarceration that are not expressly authorized. See 2A Sutherland on Statutory Construction § 47.23 (4th ed. 1984) (designation of specific provisions for executing certain functions implies exclusion of other, more general provision). Thus, 18 U.S.C. § 4002 provides that the Attorney General may contract with state and local governments for "the imprisonment, subsistence, care, and proper employment" of prisoners for up to three years, and 18 U.S.C. § 4003 authorizes the Attorney General to build new prison facilities if such state or local governments are unwilling or unable to enter into such contracts or if suitable facilities are not available at a reasonable cost. There are no provisions addressing places of prisoner confinement in the private sector. By contrast, other statutes involving the confinement of persons have explicitly authorized the use of private sector facilities for such confinement. See, e.g., 18 U.S.C. § 4013 (authorizing the U.S. Marshals Service to contract with private facilities for the housing of federal pretrial detainees); 18 U.S.C. §§ 5040 (permitting the housing of juvenile offenders in private facilities).

19 The BOP's privately-managed facility in Taft, California was authorized in a 1996 appropriations bill (Conference Report 104-863 to Public Law 104-208, Sept. 28, 1996), while the privatization dimension of the federal takeover of the District of Columbia's Lorton, Virginia facility was provided for in the National Capital Revitalization and Self-Government Act of 1997 (Pub. L. No. 105-33 § 11201(c)(1)).

20 Certainly, without a proper legislative mandate defining with some specificity what can and cannot be undertaken in the way of private sector operation of government correctional facilities, the allocation of public and private responsibilities may become confused and public trust eroded. This has been manifested most clearly in the case of states that have sought to gain more control over the housing of out-of-state inmates within the state, see, e.g., the recently-passed Ohio House Bill 293, effective March 17,

privatization based on a lack of proper statutory authorization should be relatively rare because most prison privatization arrangements feature *some* type of statutory authorization sufficient to reflect a general policy choice in favor of correctional privatization. A more potent regulatory challenge involves litigation seeking to invalidate a particular kind of private contractor authority or conduct, based on due process concerns, as discussed below.²¹ Most private prisons operate according to statutes and/or contracts that retain some critical oversight, rulemaking and decision making in the hands of government correctional authorities.

B. Addressing Possible Due Process Concerns in Correctional Privatization

The most serious constitutional challenges to contracting out the management of prisons may arise when private contractors are deemed to have excessive power over prison rulemaking and decisions affecting inmates' basic liberties. These situations indicate issues of possible financial bias and unchanneled discretion in prison management that raise potential due process concerns. While these concerns can give rise to specific civil rights challenges by inmates and their legal representatives, such due process objections may also serve as the basis for courts to invalidate certain arrangements on "delegation" grounds. As with statutory authorization deficiencies, however, it may only be certain aspects of the overall privatization scheme that are so invalidated.

1. Basic Due Process Principles Governing Delegation Scenarios

The Due Process Clause has given rise to an influential line of Supreme Court cases invalidating the delegation of discretionary rulemaking or adjudication powers to financially interested parties.²² It has also generated support for the idea that private delegations are permissible where the private entity's role is subordinated to adequate public involvement, oversight, and/or approval.²³ These standards are applicable to the federal and state governments alike, since the Due Process Clause has the effect of making constitutional restrictions on private delegations applicable to

1998, discussed *infra* in section 7.B.

21 As discussed above, due process considerations and the delegation doctrine share a concern about the exercise of arbitrary, unaccountable government power. Indeed, private delegation cases tend to rely on a due process analysis, due to fuzziness of the delegation doctrine, its origins in separation-of-powers jurisprudence and its general disuse. Due process analysis has in fact guided most of the key federal court decisions invalidating private party delegations, including *Carter v. Carter Coal Co.* But these decisions have unfortunately blurred the separate and distinct nondelegation and due process issues and standards. See Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 Hastings Const. L. Q. 165, 204 (1989).

22 In the rulemaking context, see, e.g., *Eubank v. City of Richmond*, 226 U.S. 137 (1912) (striking down local ordinance authorizing majority of landowners to impose set-back requirements on neighbors); *Carter v. Carter Coal Co.*, *supra*. In the adjudication context, see, e.g., *Shniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969) (invalidating law authorizing private parties to garnish employee wages before employees can respond to garnishment in court); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (striking down state optometry board's adjudication of conduct by corporate salaried optometrists where board was composed of individual optometrists with a financial interest in reducing corporate competition).

23 See, e.g., *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939) (creation of market controls by producers judged constitutionally acceptable based on government-imposed requirement that 2/3 of producers waive antitrust restrictions); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) (industry officials allowed to propose non-binding minimum prices where officials functioned "subordinately" to a public commission); *Fuentes v. Shevin*, 407 U.S. 67, 80-83 (1972) (state-sanctioned prejudgment repossession of property by private companies permissible only if property owners have opportunity to resist seizure before a judge).

the fifty states through the Fourteenth Amendment.²⁴ In general, it would appear that the more *administrative* the role of private companies -- that is, the more they are responsible for carrying out predetermined policy choices by government officials -- the more likely it is that significant privatization schemes will pass constitutional muster.

While explicit direction from the Supreme Court about due process standards in the private delegation context is lacking, the best guidance by way of analogy may come from federal appeals courts that have ruled on regulatory and adjudicatory standards for securities markets adopted by private securities associations pursuant to the federal Maloney Act. The so-called "Todd Standards," first articulated in the case of *Todd & Co. v. SEC*,²⁵ set forth three factors that enabled the regulatory scheme at issue to accord with due process. First, the private entity's rules had to be approved by a governmental authority before becoming effective. Second, all private decisions regarding rule violations and penalties had to be subject to governmental review. Finally, all such private adjudications had to be governed by a *de novo* standard of review, whereby government officials would draw their own factual and legal conclusions about the violation and penalty in each case.²⁶

The Todd Standards are by no means dispositive of the application of due process to private prisons. Indeed, the *Todd* case dealt with property rights, not the liberty interests that are at stake in the case of private prisons. Yet perhaps for that very reason -- the more serious liberty interests at issue in the latter case -- the Todd Standards would seem to suggest by analogy certain baseline requirements for private prisons.

Accordingly, these standards suggest that private prisons should not have uncontrolled power to make adjudicatory or rulemaking decisions that would disfavor inmates' individual liberties. In particular, as discussed in greater detail below, private contractors presumed financial interests should disqualify them from having the power to make sensitive release-related decisions, including those involving sentencing, parole, release dates, furloughs, discipline and other matters affecting 'good time' credits, and specific work assignments and work credits. These types of decisions generally overlap with the release-related rights that were recently deemed by the Supreme Court in *Sandin v. Connor* to define the general contours of due process within prisons.²⁷

Meanwhile, the presumed lack of private contractors' financial disinterestedness should also disqualify private contractors from making *rules* that govern any of these subjects. The reasons are obvious: because private contractors have a *potentially* strong (it need not actually be strong) interest in maximizing their inmate populations, they may have an incentive to write release-related rules and make release-related decisions that affect good time calculations and ultimately disfavor prisoners. In some cases, this potential bias can be avoided by having a contract specify a contractor fee that is

24 See Liebman, *Delegation to Private Parties in American Constitutional Law*, 50 Ind. L. J. 650, 652-54 (1975).

25 557 F.2d 1008 (3d Cir. 1973).

26 *Id.* at 1012.

27 In *Sandin*, 515 U.S. 472 (1995), the Supreme Court moved to scale back the scope of prison due process protections arising directly under the U.S. Constitution to those situations which impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Despite this significant, albeit hazy constriction of due process protections within prison confines, the *Sandin* ruling leaves in place any protections that would ultimately affect the timing of a prisoner's release.